...BRARY
...PREME COURT, U. S.

No. 255.

Office-Supreme Court, U.S.
FILED
JUN 19 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

WILLIAM A. WAX,

Petitioner,

vs.

FRANK J. PATE, Warden, Illinois State Penitentiary, Joliet-Stateville Branch,

Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit.

PETITION FOR A WRIT OF CERTIORARI

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on March 31, 1969.

Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit filed in this cause sub. nom. *United States ex rel. Wax* v. *Pate,* is as yet unreported and is attached hereto as Appendix A.

The unreported opinion of the United States District Court for the Northern District of Illinois is attached hereto as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 31, 1969. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented For Review

1. Whether an in custody post indictment pretrial psychiatric examination, by a state employed psychiatrist, of a murder defendant who later interposes an insanity defense, is a "critical stage" of the proceedings against the defendant.

2. Whether a defendant in custody awaiting trial for a state murder indictment who was examined by a state employed psychiatrist, in the County Jail, without notice having been given to defendant's retained counsel and without giving counsel opportunity to be heard by the Court or to give advice to the defendant in regard to the psychiatric examination, was denied his Sixth and Fourteenth Amendment right to the assistance of counsel at a "critical stage" of the prosecution against him.

3. Whether a defendant such as described in question 2 above has been subjected to an unreasonable seizure contrary to the Fourth Amendment, and therefore, whether any evidence obtained by the state as a result of the psychiatric examination ought to be suppressed.

Statement of Facts

The petitioner, William A. Wax, initiated the action in the United States District Court for the Northern District of Illinois, Eastern Division, to secure his release from the Illinois State Penitentiary on a writ of habeas corpus. Federal jurisdiction is based upon Title 28 United States Code, Section 2241. The District Court denied the petition and issued a certificate of probable cause for appeal. The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court.

The petitioner was convicted of the crime of murder by Circuit Court of the Fifth Judicial Circuit of Illinois, Edgar County, on January 27, 1965. Sentence of 20 to 35 years imprisonment in the Illinois State Penitentiary was imposed. His conviction was affirmed by the Appellate Court of Illinois, Fourth Judicial District, in *People v. Wax*, 75 Ill.App.2d 163, 220 N.E.2d 600. The Illinois Supreme Court denied leave to appeal on January 18, 1967, and this Court denied certiorari on May 29, 1967, 387 U.S. 930.

The issue here is whether the petitioner was deprived of his Sixth and Fourteenth Amendment right to counsel at a "critical stage" of the prosecution where he was examined by a psychiatrist prior to trial, at the State's request, while in custody in the County Jail, without notice to his retained counsel and in counsel's absence; and whether the examination constituted an unreasonable seizure in violation of the Fourth Amendment.

As to these issues, the facts are not in dispute. The District Court accepted the facts as found by the Appellate Court of Illinois. (See District Court Opinion, App. B, *infra*, p. App. 6)

After the indictment was returned and after petitioner had retained counsel and while he was being held in custody in the County Jail, the petitioner was examined by one Dr. Groves B. Smith, a psychiatrist. Dr. Smith examined the petitioner at the request of the State's Attorney of Edgar County for the purpose of obtaining evidence to rebut a defense of insanity. The petitioner's attorney was not notified of this examination, no court order had been obtained by the State permitting such examination, nor was the petitioner given any opportunity to consult with his counsel prior to the examination and concerning the examination. Not until the examination was almost completed, was the petitioner permitted to consult with counsel, at which point the examination was terminated. Dr. Smith testified at the trial of the case that the petitioner was not insane at the time of the commission of the offense. Dr. Smith's opinion was based, in part, upon the above described examination in the Edgar County Jail.

Reasons For Granting Writ

The first two questions presented by this Petition involve matters never before decided by this Court. The third question raises a point which while not raised in the lower courts is of extreme importance because through it we demonstrate that the reasoning of the lower courts here is in clear conflict with the reasoning of this court in *Davis* v. *Mississippi*, ... U.S. ....., 89 S. Ct. 1394.

The District Court and Court of Appeals determined that the pre-trial psychiatric examination conducted in this case was not a "critical stage" of the prosecution and that absent a showing that the procedure utilized resulted in actual prejudice to petitioner which denied him due process as guaranteed by the Fourteenth Amendment, his petition for habeas corpus must be denied.

The first question which therefore must be determined by this Court is whether a pre-trial psychiatric examination is a critical stage of the prosecution.

This Court defined the term in *United States* v. *Wade*, 388 U.S. 218, 227, when it said, "In sum, the principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pre-trial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."

The Court in *Wade* distinguished critical stages from "preparatory steps, such as systematized or scientific analyzing of the accused's finger-prints, blood sample, clothing, hair, and the like." 388 U.S. 218, 227. As the Court said, "Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." 388 U.S. 218, 227-228.

A psychiatric examination bears little resemblance to the preparatory steps described above. One has yet to devise a method whereby a technician with little or no scientific expertise can mix chemicals, push buttons, look under a microscope, etc., and observe a reaction which would universally be agreed upon to indicate that the person upon whom the test was conducted was a schizophrenic, a paranoid, or whatever other psychiatric diagnosis was applicable.

It is necessary, therefore, that a defendant whose sanity is in issue should be given the opportunity to insure that his examination by psychiatrists retained by the prosecution is carried out in the proper manner and under the proper conditions.

We do not, it must be noted, contend that the State has no right to conduct a psychiatric examination of a defendant once his mental condition has been placed in issue. See *Hope* v. *United States,* 8 Cir., 372 F.2d 710; *United States* v. *Albright,* 4 Cir., 388 F.2d 719; nor do we contend that the defendant had the right to have his counsel present at the psychiatric examination. *United States* v. *Albright,* 4 Cir., 388 F.2d 719.

The Sixth Amendment speaks not of the "presence" of counsel but of the "assistance" of counsel. While the two terms might be synonymous in certain factual situations, they are not necessarily so and a defendant may be entitled to the assistance of counsel in a situation in which he is not entitled to the presence of counsel. An example which comes to mind is the witness before the grand jury who, while he is not entitled, as yet, to the presence of his counsel in the grand jury room, may nevertheless consult with his attorney during his appearance before the grand jury. *People* v. *Ianniello,* 21 N.Y.2d 418, 235 N.E.2d 439.

This Court in *Escobedo* v. *Illinois,* 378 U.S. 478, 487, used language which is most appropriately applicable to the situation present in this case. "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158. This was the 'stage when legal aid and advice' were most critical to petitioner. Massiah v. United States, supra, 377 U.S., at 204, 84 S.Ct. at 1202. It was a stage surely as critical as was the arraignment in Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed. 2d 114, and the preliminary hearing in White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193. What happened at this interrogation could certainly 'affect the whole trial,' Hamilton v. Alabama, supra, 368 U.S. at 54, 82 S.Ct. at 159 since rights 'may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.' Ibid."

This Court further embellished upon the above cited cases in *United States* v. *Wade,* 388 U.S. 218, 226-227.

There it was said, "Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions 'no more than [reflect] a constitutional principle established as long ago as Powell v. Alabama * * *.' Massiah v. United States, supra, 377 U.S. at 205, 84 S.Ct. at 1202. It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be contronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. Cf. *Pointer* v. *State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923."

The aid which counsel could give in a situation such as occurred in this case is amply demonstrated by an opinion of the Supreme Court of New Jersey which held that the State has the right to subject a defendant who alleges insanity to a psychiatric examination. The court laid down the procedures to be followed. We quote from the opinion in *State* v. *Whitlow*, 45 N. J. 3, pages 25-26:

"We perceive the difficulties attending the State's effort to meet a claim of insanity, particularly at the time

of trial where the allegation is offered to show lack of criminal responsibility for the offense. The State cannot be left helpless to meet the defense, and the imposition of reasonable conditions on its presentation ought not be deemed barred by the privilege against self-incrimination. In our judgment the following course does not offend the privilege:

'1. At arraignment on the indictment or at some later time to be fixed by Supreme Court rule, but sufficiently in advance of trial to enable the State to prepare therefor, defendant should give notice to the State of his intention to advance the defense of insanity at the time of trial;

"2. The State has the right to a psychiatric examination; defense experts may be present;

"3. If its experts can form an adequate opinion of the defendant's sanity by observation and physical examination alone, their action should be so limited;

"4. If a psychiatric interview with defendant is required for the purpose, and an adequate opinion can be reached without inquiry into the circumstances surrounding the alleged criminal event, the interview should be so restricted.

"5. If an adequate opinion cannot be formed without inquiry into the circumstances attending the alleged crime, the inquiry should be made. The defendant should cooperate therein fairly, unless he lacks mental capacity to do so. The evidentiary character of any inculpatory statements shall be limited expressly to the claim of insanity, and shall not be admissible on the issue of guilt. The jury shall be so instructed as the testimony is offered, and again in the charge to the jury;

"6. If a defendant is capable mentally of co-operating to the extent deemed necessary by the doctors, and he fails or refuses to do so, on motion of the State the defense psychiatric testimony shall be limited to the same extent;

"7. On demand defendant is entitled to copies of the State's psychiatric examination reports subject to delivery to the State of copies of his own, if requested. (See New Jersey Supreme Court Committee report, supra, proposed Rule 3:5-11(b) and (d); Federal Committee report, supra, proposed Rule 16(a) and (e); Jones v. Superior Court, supra (122 Cal.Rptr., at p. 882; 372 P.2d at p. 922).)"

The procedure suggested above is the one which is required by due process and right to the effective assistance of counsel. The standards for notice and hearing are but little different from those required by rules of civil procedure in the State of Illinois or in the Federal Courts. See former Rule 17-1[1] and present

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[1] (Supreme Court Rule 17-1). **Physical and Mental Examination of Parties and Other Persons.** 1. In any action in which the physical or mental condition of a party or of a person in his custody or legal control is in controversy, the court upon notice and for good cause shown on motion made within a reasonable time before the trial, may order the party to submit to a physical or mental examination by a physician suggested by the party requesting the examination, or to produce for such examination the person in custody or under legal control who is to be examined. The court may refuse to order examination by the physician suggested but in that event shall permit the party seeking the examination to suggest others. A party or person shall not be required to travel an unreasonable distance for the examination. The order shall fix the time, place, conditions and scope of the examination and designate the examining physician.

* * *

3. Within twenty days after the completion of the examination, and in no event later than ten days before trial, the ex-

Rule 215 of the Supreme Court of Illinois[2] and Rule 35 of

(Footnote 1 continued)
amining physician shall prepare duplicate originals of a written report of the examination, setting out his findings, results of all texts made, his diagnoses and conclusions, and deliver or mail an original of his report and of all corrections, supplements, or additions thereto, to the attorney for the party requesting the examination and a duplicate original thereof to the attorney for the party examined or for the party who produced the person who was examined. The court may enforce compliance with this requirement. If the report is not delivered or mailed to the attorney for the party examined, or for the party who produced the person who was examined, within the time herein specified or within any extensions or modifications thereof granted by the court, neither the physician's report nor his testimony or his findings or x-ray films or the results of any tests he has made may be received in evidence except at the instance of the party examined or who produced the person examined.

[2] (Supreme Court Rule 215). **Physical and Mental Examination of parties and Other Persons.** (a) **Notice; Motion; Order.** In any action in which the physical or mental condition of a party or of a person in his custody or legal control is in controversy, the court upon notice and for good cause shown on motion made within a reasonable time before the trial, may order the party to submit to a physical or mental examination by a physician suggested by the party requesting the examination, or to produce for such examination the person in custody or under legal control who is to be examined. The court may refuse to order examination by the physician suggested but in that event shall permit the party seeking the examination to suggest others. A party or person shall not be required to travel an unreasonable distance for the examination. The order shall fix the time, place, conditions, and scope of the examination and designate the examining physician.

* * *

(c) Physician's Report. Within 21 days after the completion of the examination, and in no event later than 14 days before trial, the examining physician shall prepare duplicate originals

the Federal Rules of Civil Procedure.[3]

The procedures established by the Supreme Court of New Jersey are a recognition that as is the case with secret interrogations, there is serious difficulty in depicting what transpires at psychiatric examinations. Pri-

(Footnote 2 continued)
of a written report of the examination, setting out his findings, results of all tests made, his diagnosis and conclusions, and deliver or mail an original of his report and of all corrections, supplements, or additions thereto, to the attorney for the party requesting the examination and a duplicate original thereof to the attorney for the party examined or for the party who produced the person who was examined. The court may enforce compliance with this requirement. If the report is not delivered or mailed to the attorney for the party examined, or for the party who produced the person who was examined, within the time herein specified or within any extensions or modifications thereof granted by the court, either the physician's report nor his testimony or his findings or X-ray films or the results of any tests he has made may be received in evidence except at the instance of the party examined or who produced the person examined.

[3] (Federal Rules of Civil Procedure, Rule 35).. **Physical and Mental Examination of Persons.** (a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Findings. (1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After

vacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on. Compare, *United States* v. *Wade,* 388 U.S. 218, 230. By permitting the trial court to set guide lines for the psychiatric examination including the presence of a defense expert at the examination, there is obviated the grave potential for prejudice, intentional or not, in the pretrial psychiatric examination which may not be capable of reconstruction at trial.

A consideration of the circumstances surrounding the pretrial psychiatric examination of the petitioner indicates that there is convincing proof that he was denied the assistance of counsel contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States.

We further ask the Court to consider the present case in the light of *Davis* v. *Mississippi,* ..... U.S. ....., 89 S.Ct., 1394, decided on April 22, 1969. There the Court

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(Footnote 3 continued)
such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refused to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

held that the detention of the petitioner during which the fingerprints used at trial were taken constituted an unreasonable seizure of his person in violation of the Fourth Amendment.

In the present case, there is no question but that the defendant was legally under detention by virtue of the process issued in connection with his indictment. That detention, however, was for only one valid purpose—to insure the presence of the defendant at his trial upon the indictment. When the State utilized his previously legal detention to obtain evidence which it could not have obtained had the defendant been admitted to bail, the detention became illegal and hence, any evidence obtained thereby ought to be excluded.

Again, we must point out that, to paraphrase the language of the Court in *Davis,* the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining during the course of a criminal investigation, and we might add, during the course of preparing for a criminal trial, the psychiatric examination of a defendant for whom there is probable cause to believe that he will interpose a defense of insanity.

The State in this case made no attempt to follow such procedures. As was declared over two decades ago by this Court in *Johnson* v. *United States,* 333 U.S. 10, 13-14: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Therefore, without even having to reach the question of whether defendant's counsel should have been notified of a proceeding by the State seeking an order to compel the defendant to submit to a psychiatric examination, it may be readily decided that psychiatric examination in this case must be excluded from evidence because there never was a hearing to determine probable cause.

Conclusion

For the above and foregoing reasons, a writ of certiorari ought to issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Respectfully submitted,

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